IN THE

Supreme Court of the United States

October Term, 1950.

No. 518.

THE MONTANA POWER COMPANY, a corporation, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

The Commission's Brief in Opposition[1] does not question the Company's statement of the Questions Presented nor the accuracy of the facts set forth in the Petition. Neither does it add any material facts to those stated in the Petition.

The Petition discusses the opinion below as to which review by this Court is sought. The Brief in Opposition, so

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[1] Designated (Br. Op. ·).

far as the facts are concerned, merely summarizes the Commission's findings. In this brief we shall cover only the more important matters as to which statements in the Brief in Opposition require a reply.

NAVIGABLE WATERS.

The statement on page 11 of the Brief in Opposition that the Commission found ". . . that relatively little improvement would be required to obtain an unobstructed 2.5 foot channel permitting light-draft navigation from Fort Benton to Belt Creek below the falls. . . .", is incorrect. The Commission did not so find. Had it done so the finding would have been contrary to the undisputed evidence. The Chief of Engineers at all times reported that the entire forty-nine (49) mile reach from Fort Benton to the mouth of Sun River was unnavigable and not susceptible of improvement, that no work was ever done on it and no work ever projected for it (R. 557, 558, 588).

Ex. 17B, 1891, pp. 275, 2232.
Ex. 17B, 1893, p. 2297.
Ex. 17B, 1894, p. 270.
Ex. 17B, 1895, pp. 301, 2215.
Ex. 17B, 1896, pp. 260, 1867.
Ex. 17B, 1897, pp. 334, 2179.
Ex. 17B, 1898, p. 323.
Ex. 17B, 1899, p. 385.
Ex. 17B, 1900, p. 444.
Ex. 17C, 1915, p. 1896.
Ex. 17C, 1920, p. 1250.

There is no contrary evidence.

While the Brief in Opposition refers to portages made around the falls with smaller craft (Br. Op. 7, 23), the only instances mentioned are the Lewis and Clark expedition[2],

[2] The fact that Lewis and Clark took canoes over a stretch of water is not evidence that it is navigable. They dragged their canoes to a point in the Beaverhead River one hundred (100) miles above Three Forks (Pet. 12). The Beaverhead River is a tributary of the Jefferson River. Both are unnavigable (R. 985-987).

the trip downstream by Roberts in a skiff, and possible use by miners.

The Commission makes no effort to dispute the Company's statement regarding the lack of substantiating evidence as to the trips by miners[3] (Pet. 13, 14). On the whole record, considering the contemporary reports of the Chief of Engineers and the Roberts report in 1872 (Pet. 14), the findings of the Commission and the Court below as to the transportation of miners are not supported by substantial evidence.

Any question as to the duty of reviewing courts to scrutinize the substantiality of the evidence to support findings of the Commission was removed by the decision of this Court in *Universal Camera Corporation* v. *National Labor Relations Board,* No. 40, February 26, 1951. The Court there said:

> And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.
>
> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is the clear meaning of the reference in both statutes to "the whole record." Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the

[3] The footnote on page 8 of the Brief in Opposition refers to an 1867 legislative grant of a toll road privilege as supporting evidence. There is no evidence that any such road was ever commenced or even seriously contemplated.

important purposes of the movement which eventuated in that enactment.

In a footnote on Page 18 of the Brief in Opposition, the Commission seeks to justify the admission of newspaper advertisements and similar items. The Montello, 20 Wall. 430, 440-442, is cited as authority for admitting newspaper advertisements. The inference is that this Court approved the admission of a newspaper advertisement as evidence of navigation. This Court actually based the statement on the decision in *Doty* v. *Strong*, 1 Pinney (Wis.) 316. (See footnote, 20 Wall. 442). That case involved a suit for damages for failure of a common carrier to transport goods up the Fox River from Green Bay to Portage. It was proved that defendants were engaged in transporting property up the Fox River and that the advertisement was their advertisement (pp. 317, 324, 325). The advertisement was admitted for the purpose of proving that defendants were common carriers (pp. 324, 325). It is clear that this Court in The Montello did not rely upon a newspaper advertisement as proof that the boats went up the Fox River.

None of the other authorities cited in the footnote deals with the admission of newspaper items over objection. In the instant case, timely and appropriate objection was made to the admission of all such items.

The footnote on page 9 of the Brief in Opposition, referring to the 1901 report of the Chief of Engineers, states that ". . . combining figures for traffic between Great Falls and Cascade with those for traffic between Cascade and Stubbs Ferry shows a total of 2,528 tons of freight and 11,175 passengers carried (p. 2394)."

This footnote does not state the period covered. The report shows that it is a tabulation of freight and passengers carried on the reach between Great Falls and Stubbs Ferry between 1894 and 1900, inclusive.

General Max C. Tyler, USA Retired, formerly Assistant Chief of Engineers, testifying as a witness for the Com-

pany, described the method of compiling such statistics. He stated:

> The custom in reporting commercial statistics was and is to report river traffic by reaches, usually under the headings of 'appropriations.' Traffic which moves any distance on a reach, even if it moved only one mile, is reported under the general heading of the reach; that is, traffic moving anywhere on that part of the river between Stubbs' Ferry and Great Falls was reported under that heading. Traffic moving on any part of the river between Great Falls and Buckshot Island, 16 miles above Great Falls, was reported under the heading "Stubbs' Ferry to Great Falls." Excursion passengers on "The Rose" were also reported in the reach between "Stubbs, Ferry and Great Falls." This does not indicate a movement over more than a portion of the reach. (R. 568, 569).

He also testified that Government freight and passengers were probably included (R. 566, 593). The Government work carried on during that period, together with the traffic on the lower end of the Long Pool and the excursionists carried by the *Rose* near the Gates of the Mountains (Pet. 15), readily account for the figures given. There is no inference from them that any freight or passengers were carried from Great Falls to any point above the Long Pool or from any point above the Long Pool to Great Falls.

On page 12 of the Brief in Opposition, the Commission states that the reports of Army engineers consistently reflected the navigable status of the river ". . . between Fort Benton and Three Forks." This is easily disposed of by the reports themselves. The report of the Chief of Engineers for 1915, p. 1896, (Exhibit 17C, 1915, p. 1896) states,

> (d) Fort Benton to Stubbs Ferry—as far as navigation is concerned the head waters of the Missouri are completely and permanently separated from the river below. Between Fort Benton and Great Falls, 49 miles, the river has a descent of 695 feet, with three sheer falls of 90, 50, and 26 feet, and numerous rapids

> and smaller cascades. Navigation is impossible and the section has never been regarded as susceptible of improvement.

The 1892 report of Captain Powell states:

> Any navigation, which might obtain will necessarily be local. There is no chance for a navigation connection with the river below Fort Benton on account of the insurmountable obstructions in the Great Falls, whose total fall is about 550 feet, and which, with the bad rapids tailing out from the lower fall, extend over some 30 miles or more. (R. 1389)

The statement on page 20 of the Brief in Opposition that the Commission pointed to a War Department plan finally revised in 1898 ". . . for providing a channel of not less than 2.5 feet deep at a cost of $213,646.50, together with an inexpensive narrow-gauge rail link around the falls (*Supra*, p. 11)", is misleading. The Army engineers never proposed such a railway or any other device for bypassing the forty-nine (49) mile reach from Fort Benton to the mouth of Sun River.

Throughout the Brief in Opposition the Commission attempts to divert attention from the impassable and unimprovable forty-nine (49) mile reach just above Fort Benton and to center attention on the limited and purely local use of unrelated sections above the falls. An example is found on page 17 of the Brief in Opposition where the Commission states, "Clearly, even the upper Missouri River is more navigable than portions of the New River involved in the *Appalachian* case." Obviously, this is not so if the forty-nine (49) mile reach from Fort Benton to the mouth of the Sun River is taken into account for, in the New River case, there were many instances of through interstate use by water (311 U. S. 415). It is not even correct as to the Missouri River above the Long Pool for, in the New River case, there were many instances of navigation in both directions, while in this case the only instances of up-stream

travel above the Long Pool were Lewis and Clark and the *Rose*.

The Commission does not question the analysis of the facts in any of the controlling cases as set forth in the footnote at page 23 of the Petition nor does it suggest any other controlling case. Through interstate use by water has existed in every case held to constitute "navigable waters" or navigable waters of the United States. It does not exist here.

CONGRESSIONAL ASSERTION OF JURISDICTION.

Under this heading the Commission on page 12 of the Brief in Opposition refers to surveys and examinations of the river between Fort Benton and Three Forks, to the appropriation of funds for improvements above the falls, and to Acts of Congress authorizing construction of dams at various points with provisions protecting the interests of navigation. None of these factors is any evidence of navigability, much less interstate navigability. These factors were also present in *Oklahoma* v. *Texas*, 258 U. S. 574, but this Court held that no inference of navigability arose from them (pp. 585, 586, 590).

AUTHORITY TO OCCUPY LANDS OF THE UNITED STATES.

The Commission's argument with regard to the permits and rights of way authorizing the occupancy and use of the public lands at Hauser and Hebgen is based entirely upon the assumption that there was a violation of provisions of the permits or applicable regulations of the Secretary of the Interior or the Secretary of Agriculture. If such was the case, the Secretaries have ample authority to take such action as they might deem appropriate. The application of regulations rests solely in the discretion of the Secretary of the Department issuing them. (Pet. p. 27, *Smith* v. *U. S.*, 24 Ct. Cls. 209; *Palmer* v. *U. S.*, 72 Ct. Cls.

401). The Commission's Brief does not mention either of these cases.

The fallacy of the Commission's position is high-lighted by the statement (Br. Op. 31) that,

> To protect the public interest and to insure the proper discharge of these obligations, the departmental Secretaries certainly are free to scrutinize every transfer of these permits regardless how achieved.

The question here involved is not whether the Secretary of the Interior or the Secretary of Agriculture has authority to take any action with regard to these permits issued by them, but whether the Federal Power Commission has such authority.

The Commission places considerable reliance upon the assertion that these permits are personal in nature (Br. Op. 27, 30). This is not correct and is in conflict with the decision of this Court in *Swendig* v. *Washington Water Power Company,* 265 U. S. 322, and the decision in *Washington Water Power Company* v. *Harbaugh,* 253 Federal 681.

Section 23 (a) of the Federal Power Act[4] provides that,

> The provisions of this Part shall not be construed as affecting any permit or valid existing right of way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law . . . .

The action of the Commission in this case clearly affects the permits and is in violation of this provision of the Act. Nevertheless, the Commission seeks to explain away its action by the statement in footnote 24 (Br. Op. 27) that,

> The Commission's Order does not invalidate the permits but rather merely holds that in the circumstances of this case the Company's possession of these

[4] Quoted at page A 1 of the Appendix to the Petition for Certiorari.

> permits does not operate to exempt these projects now operated by it, rather than by the original permittees, from the licensing requirements of the Act.

This is simply double-talk. If the permits issued by the Secretary of Agriculture and the Secretary of the Interior prior to 1920 are recognized by the respective Secretaries, the Fedral Power Commission has no authority to require a license. This is the conflict which this Court is called upon to resolve. This question is of vital importance in the administration of the Federal Power Act and of the Act of February 15, 1901.

CONCLUSION.

For the reasons stated in the Petition for a Writ of Certiorari it should be granted.

Respectfully submitted,

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On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING

Petitioner, The Montana Power Company, prays that this Court grant rehearing of its order of March 12, 1951, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit, as prayed for in the petition filed January 26, 1951.

Reasons for Granting Rehearing and Issuing the Writ

1. The Commission's order, which was affirmed by the Court below, is not supported by and in accordance with the reliable, probative and substantial evidence as required by Section 7(c) of the Administrative Procedure Act[1] which provides that no sanction shall be imposed or rule or order issued unless so supported.

Section 2(f)[2] defines "sanction" as including the requirement to take a license.

That Act is applicable (*National Labor Relations Board v. The Pittsburgh Steamship Company*, No. 42, decided February 26, 1951, 19 LW 4136).

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[1] (c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and *no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.* Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (Emphasis supplied.) (60 Stat. 241, 5 U.S.C. 1006(c).)

[2] (f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency * * * (6) requirement, revocation, or suspension of a license; * * *. (60 Stat. 238, 5 U.S.C. 1001(f).)

The *Pittsburgh* case and *Universal Camera Corporation* v. *National Labor Relations Board*, No. 40, also decided February 26, 1951, 19 LW 4160, establish the law to be that the evidence supporting a finding of the Federal Power Commission must be substantial when viewed on the record as a whole.

It is true, as this Court points out in the *Universal Camera* case, that when a Court of Appeals properly applies that principle, the power of this Court to review the correctness of the application of the standard announced "ought seldom to be called into action" (19 LW 4164).

The *Pittsburgh* and *Universal Camera* decisions were rendered after the decision of the court below in this case, and it is clear from the record that the court below did not apply the requisite standards in reviewing the findings of the Federal Power Commission. For example, in regard to the transportation of miners returning to the "States" from around Helena, the Commission stated:

> Though *no description of these specific boats is available*, it seems certain that they were manually-powered and *probably* were large, sharp-ended bateaux. *Nor does the record fix* the beginning and ending of this particular use of the River. *Probably* it started soon after the 1864 discovery of gold at Helena. *Chances are* it diminished soon after 1868 when most of the gold had been extracted, and ceased around 1870 when the placers were exhausted. (Emphasis supplied) (R. 67.)

This language demonstrates beyond question that the finding of the Commission is based upon conjecture and surmise and not upon substantial evidence. The Brief in Opposition does not question the Company's analysis of the evidence on that subject at page 14 of the petition nor does it suggest any other evidence which might support the finding.

Nevertheless the court below affirmed the Commission's finding, stating:

> The only reported use of the entire length of the up-

> per river for through traffic from above the falls to Fort Benton below occurred from 1864 to 1870. During that period, gold miners in considerable number traveled downstream with the aid of a portage or "land carriage" around the falls. (R. 1671.)

The finding of the Commission is the type of finding condemned by this Court in the following language from the *Universal Camera* case:

> Accordingly, it (the evidence) "must do more than create a suspicion of the existence of the fact to be established . . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbia Enameling & Stamping Co.*, 306 U.S. 292, 300.

The court below states that this is the only reported use for through traffic from above the falls to Fort Benton. Obviously this finding was of determinative effect in the court's holding that, on the basis of actual use, the river from Fort Benton to Three Forks is "navigable waters" under Section 3(8).

The determination that a stream constitutes "navigable waters" is a question of law, not a question of fact (*U.S.* v. *Appalachian Electric Power Company*, 311 U.S. 377, 404 and 405). That legal conclusion in the present case is based upon findings of fact which are not supported by substantial evidence and which have not been reviewed by the court below in accordance with the standards so recently announced by this Court in the *Pittsburgh* and *Universal Camera* cases.

The federal law, established by an unbroken line of decisions by this Court, is that a river to be navigable in law must be navigable in fact (Pet. p. 23). Congress adhered to this rule in defining "navigable waters" in Section 3(8) of the Federal Power Act (Pet. p. 20). Nevertheless, the Commission has construed this Section so as to make "navigable waters" a reach which is absolutely impassable in fact and not susceptible

improvement (Pet. Reply Br. p. 2). The Court below of cepted the legal conclusion of the Commission.

ac The Company has not been afforded the judicial review the Commission's decision to which it is entitled under the of Administrative Procedure Act. This Court should, therefore, Ac elf review the record to determine whether the findings its supported by substantial evidence and whether the con- are sions of law are correct.

clu 2. There is virtually no possibility of a conflicting de- cisi on on "navigable waters" in any other circuit. In this respect the case at bar presents an even more compelling gro und for rehearing than was presented in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, referred to in Rule 33(2) of this Court, in which case rehearing of an order der ying certiorari was granted because the concentration of the automobile industry in the Sixth Circuit was such that liti gation elsewhere with a resulting conflict of decisions was im probable.

The question here, so far as "navigable waters" is con- cer ned, is whether the reach in question constitutes such wa ters within the meaning of Section 3(8) (Pet., pp. 2-4, Bri ef in Opposition, p. 2).

A conflict in another circuit as to "navigable waters" cou ld arise only in a case—

(1) Under Section 3(8);

(2) Where an extended non-navigable and unimprovable reach, like the falls section in this case, lies between a once navigable reach below and a short reach above used briefly for limited light-draft, local traffic;

(3) Where the river crosses the state line below the non-navigable and unimprovable reach;

(4) Where the dam or dams in question are located in or above the non-navigable reach; and

(5) Where the dam or dams in question were constructed prior to 1935.

It cannot be too strongly emphasized that the absence of

a direct conflict in the courts is due to the uniqueness of the fact situation as to the reach in question. No previous case has presented either of the fundamental questions on navigability in this case, namely:

(a) Whether a reach almost 50 miles long and over 500 miles above the nearest state line, actually impassable and unimprovable throughout its entire length (and conceded so to be by the Commission throughout the upper 17 miles) which reach lies immediately above the historic head of extensive early day navigation, can be held to constitute merely an "interruption" within the meaning of section 3(8), where there is no evidence of use on or around it except the scant and doubtful evidence detailed on pages 12 to 14 of the petition, and

(b) Whether the 50 mile reach and a short reach above it, all above the historic head of navigation, can be included in "navigable waters" where there is no evidence of use for the transportation of persons or property in interstate commerce with the possible exception referred to under question (a) above.

The correctness of the Company's analysis of that use and of the intention of Congress in adopting section 3(8) (Pet. p. 20) is not questioned.

The importance of the decision in this case is underscored, if such emphasis be needed, by the decision of the supreme court of Indiana in *State* v. *Kivett*, 95 N.E. 2d 145 (Nov. 14, 1950) where that court held that in determining ownership of the bed of a stream the question of navigability is to be decided on the basis of federal decisions.

The possibility of a conflict is much more remote than the possibility of a conflict in the *Schriber* case. The reasons for granting a rehearing in the instant case are more cogent than in the *Schriber* case.

3. The Final Power Permit covering Government lands at Hebgen, granted in 1914, constituted a contract between

the United States and the Permittee. The Court below held that the Permit was acquired by the Company (R. 1675).

Under the contract the Permittee acquired a vested right to occupy the lands covered by the Permit until 1964, unless the Permit was sooner revoked by the Secretary (R. 1101).

The Permit provides that no revocation will be made "until after due notice has been served upon the Permittee, and until after the Permittee shall have been given a reasonable time, not to exceed ninety (90) days after the service of said notice, within which to show cause why such revocation should not be made" (R. 1101).

No such notice has ever been given. The Secretary of Agriculture, who concededly retains jurisdiction over the Permit, has accepted and recognized the Company as the Permittee. He has also specifically determined that permits shall, under the circumstances of this Permit, remain in effect. Exhibit 169 (R. 1012) is an excerpt from the Forest Service Manual, as amended in 1946. As to permits under the Act of February 15, 1901, it provides that even if by sale, reorganization or other action the permittee has lost all financial interest in the project structures and in the Permit itself, nevertheless, if the authorized project works have been constructed and all the conditions of the Permit are being met, the Permit may be allowed to remain in effect (R. 1613).

The Permit does not provide that a transfer shall terminate it. Neither is it a mere personal privilege which would be destroyed by transfer (*Swendig* vs. *Washington Water Power Co.*, 265 U.S. 322, 329-330).

The provision with respect to transfer is *at most* a condition subsequent. As such, it would constitute *at most* a ground for declaring a forfeiture. In the absence of a specific declaration of forfeiture, the Company's rights cannot be terminated (*Schulenberg* vs. *Harriman*, 88 U.S. 44, 63; *Bybee* vs. *Oregon and California Railway Company*, 139 U.S. 663,

679; *Spokane and British Columbia Railway Company* vs. *Washington and Great Northern Railway Company*, 219 U. S. 166, 175). The Secretary of Agriculture could not revoke the Permit, except in accordance with its terms (*Noble* vs. *Union River Logging Railroad*, 147 U.S. 165). To permit the Federal Power Commission to do so, in effect, would impair the obligation of the contract. The Federal Power Act does not give the Commission power over permits issued prior to 1920; rather, it specifically preserves such permits and leaves the jurisdiction of the Secretaries over them unchanged.

The Company has acquired the Permit (R. 1675). No action has been taken to forfeit or terminate it. If the decision below is permitted to stand, the Company will be deprived of its vested property right under the contract without due process of law.

Conclusion

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted, and that upon such rehearing a Writ of Certiorari issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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March 26, 1951.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the rules of this Court.

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